TENG YOKE CHONG

v.

TENG YOON CHAI & ANOR.

HIGH COURT MALAYA, JOHOR BAHRU
ZAKARIA YATIM J
[CIVIL SUIT NO. 236 OF 1984]
7 JULY 1990

CIVIL PROCEDURE: *Cost - Party/party or solicitor/client - Failure to raise issue of costs at Supreme Court appeal-res judicata - Estoppel - Functus officio - Interpretation of part of Judge's order - Amendment of extracted order - Abuse of process.*

On 18 August 1986 judgment was entered for the plaintiff. The defendant appealed against this decision; the appeal was dismissed by the Supreme Court. However, the defendants contested the issue of costs as extracted in the order dated 18 August 1986. The plaintiffs argued that as the whole matter had been appealed and decided by the Supreme Court, the defendants were now estopped from raising the question of costs now. The question for the determination of the Court is whether the doctrine of *res judicata* applies to the present case.

Held:

[1] Applying the principle stated in *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. & Anor.* as the defendants, in their appeal, did not seek a ruling from the Supreme Court on the question of solicitor and client costs and since the issue of costs is an integral part of the order of the High Court, the question of costs is deemed to properly belong to the subject matter of the appeal before the Supreme Court.

[2] Since the defendants failed to raise the matter at the hearing of the appeal in the Supreme Court, the defendants are now estopped from raising the issue in this Court because the matter is now *res judicata*.

[Defendants' appeal dismissed with costs.]

Cases referred to:

Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. & Anor. [1975] AC 581
Malayan United Finance Bhd. v. Noormurni Sdn. Bhd & Anor. [1988] 1 CLJ (Rep) 190
Hock Hua Bank Bhd. v. Sahari bin Murid [1981] 1 MLJ 143
Adzmi bin Ali & Anor. v. Mohd. Isa bin Kasad [1987] CLJ (Rep) 37
Henderson v. Henderson [1843] 3 Hare 100
Greenhalgh v. Mallard [1947] 2 All ER 255

For the defendant/appellant - T.S. Chong; M/s. T.S. Chong & Co.
For the plaintiff/respondent - M. Pathmanathan; M/s. Yusuf, Lee Pathama & Marbeck

JUDGMENT

Zakaria Yatim J:

This is an appeal by the defendants against the decision of the Senior Assistant Registrar given on 31 October 1987 dismissing with costs the defendants' application:

(a) to set aside the order dated 18 August 1986 extracted by the plaintiff;

(b) that all taxation arising out of the said order as extracted by the plaintiff be stayed or withdrawn; and

(c) that the costs and disbursements of the application be paid by the plaintiff.

The order dated 18 August 1986 was extracted by the plaintiff after Shankar J had delivered his written judgment in this suit on 14 August 1986. Mr. T.S. Chong, Counsel for the defendants submitted that the defendants took objection to that part of the order in relation to costs. He contended that part of the order did not reflect the intention of Shankar J as stated in his judgment. The relevant part of the order dated 18 August 1986 is reproduced below:

> ... It is also ordered that all the costs of the plaintiff arising out of and incidental to this suit, that is to say solicitor and client and party and party costs, including the fees paid to Mr. L.A. Huskisson shall be taxed and the costs as taxed shall be paid to the plaintiff by the defendants who shall be jointly and severally liable for the same ...

In his judgment, Shankar J wrote:

> Finally there is the question of costs. Where there has been no misconduct on the part of trustees, the usual order is for costs to be paid out of the estate. In this case there has been misconduct on the part of the deceased and on the part of the 2nd defendant. Consequently I order that all the costs of the plaintiff arising out and incidental to this suit, including any fees paid out to Mr. Huskisson should be taxed and paid by the defendants to the plaintiff. The liability of the defendants in this regard shall be joint and several ...

Mr. T.S. Chong submitted that what the learned Judge had in mind was party to party costs including fees to be paid to Mr. Huskisson. He said, the order that was extracted contained two sets of costs - party to party costs and solicitor and client costs. He submitted that solicitor and client cost was not reflected in the judgment of the learned Judge and asked the Court to make an order on one of the following:

(1) to amend that part of the order to reflect the intention of the Court;

or

(2) to make a separate order; or

(3) to make a supplementary order.

Mr. M. Pathmanathan, Counsel for the plaintiff submitted that the order was drawn up by the plaintiff and sent to the defendants' solicitors in normal course. He said that the defendants' solicitors never returned the draft order and neither did they dispute it. The defendants had appealed to the Supreme Court against the whole of Shankar J's decision and the Supreme Court on 26 February 1987 dismissed the appeal with costs. Mr. Pathmanathan submitted that the defendants were estopped from raising the question of costs now as the doctrine of *res judicata* applied to the present case.

Mr. T.S. Chong in his affidavit affirmed on 4 July 1987 explained why his firm did not take any action on the draft order sent by the plaintiff. His explanation is as follows: On 21 August 1981 his firm received a draft copy of the order for his approval within two days. Before he could attend to the draft order he was informed that the solicitors for the plaintiff had already sent the draft order to the High Court at Johor Bahru for approval. After the delivery of the judgment in this suit he was busy with the instructions from the defendants to appeal to the Supreme Court and the appointment of Mr. Subra Naicker as Counsel in the appeal. His firm received a photostat copy of the order dated 18 August 1986 from the solicitors for the

plaintiff on 8 September 1986 but by then all the relevant documents had been handed over to Mr. Subra Naicker to enable him to prepare the appeal. The said order was later forwarded to Mr. Subra Naicker.

The question for the Court to consider is whether the doctrine of *res judicata* applies to the present case. Mr. Pathmanathan cited the Privy Council case, *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. & Anor.* [1975] AC 581. This case was an appeal from the Supreme Court of Hong Kong and I think the principle enunciated in that case on that doctrine of *res judicata* applies to the present case. In that case, Lord Kilbrandon, in delivering the judgment of the Board, said at p. 590:

> ... The *locus classicus* of that aspect of *res judicata* is the judgment of Wigram VC in *Henderson v. Henderson* [1843] 3 Hare 100, 115, where the Judge says:
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> > ...where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of a subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence might have brought forward at the time.

Lord Kilbrandon went on to state in the same judgment on the same page:

> ... The Vice-Chancellor's phrase every point which properly belonged to the subject of litigation was expended in *Greenhalgh v. Mallard* [1947] 2 All ER 255, 257 by Somervell LJ:
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> > ... *res judicata* for this purpose is not confined to the issues which the Court is actually asked to decide, but ... it covers issues of facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them ...

Applying the above principle to the present case, it is evident that the defendants' solicitors were aware of the draft order when they filed the appeal to the Supreme Court and yet they did not seek a ruling from the Supreme Court on the question of the solicitor and client costs. The issue of costs is an integral part of the order of the High Court and since that order was appealed against in its entirety to the Supreme Court, the question of costs is deemed to properly belong to the subject matter of the appeal before the Supreme Court. The defendants, exercising reasonable diligence, ought to have specifically brought forward the issue of costs before the Supreme Court at that time and it would be an abuse of the process of the Court to reopen the issue of costs at this juncture. The omission to raise the issue of costs was occasioned by negligence, inadvertence or accident. The defendants have not shown any special circumstances that would justify this Court to reopen the same subject matter of litigation. The Supreme Court in *Malayan United Finance Bhd. v. Noormurni Sdn. Bhd. & Anor.* [1988] 1 CLJ (Rep) 190 upheld the plea of the doctrine of *res judicata* and held that the principle is not a technical doctrine applicable only to records, but is a fundamental doctrine of all Courts and as the latin maxim *interest reipublicae ut sit finis litium* goes - it is for the general welfare that there must be finality to litigation. Since the defendants failed to raise the matter at the hearing of the appeal in the Supreme Court, the

defendants are now estopped from raising the issue in this Court because the matter is now res judicata. Furthermore, the Court is now *functus officio* as far as the question of costs is concerned. See *Hock Hua Bank Bhd. v. Sahari bin Murid* [1981] 1 MLJ 143 and *Adzmi bin Ali & Anor. v. Mohd. Isa bin Kasad* [1987] CLJ (Rep) 37.

For the reasons stated above I order that the appeal be dismissed with costs.

Also found at [1990] 2 CLJ 704